Supreme Court, U.S.
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No. 87-1648

In the Supreme Court of the United States

OCTOBER TERM, 1988

REGINALD POOLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in a bank robbery prosecution, defense counsel may stipulate to the federally insured status of the victim banks without obtaining the defendant's express authorization.

2. Whether petitioner was denied the assistance of counsel during sentencing.

3. Whether the district court, in a motion for collateral relief under 28 U.S.C. 2255, properly denied petitioner an evidentiary hearing on his claim of ineffective assistance of counsel.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	7
Conclusion	14

TABLE OF AUTHORITIES

Cases:

Allen v. *Hardy*, 478 U.S. 255 (1986) 6, 12
Anderegg v. *High Standard, Inc.*, 825 F.2d 77 (5th Cir. 1987) 13
Barton v. *United States*, 791 F.2d 265 (2d Cir. 1986) 7
Batson v. *Kentucky*, 476 U.S. 79 (1986) 6, 12, 13
Brookhart v. *Janis*, 384 U.S. 1 (1966) 9
Estelle v. *Williams*, 425 U.S. 501 (1976) 8
Forrester v. *United States*, 456 F.2d 905 (5th Cir.), cert. denied, 409 U.S. 856 (1972) 12
Griffith v. *Kentucky*, No. 85-5221 (Jan. 13, 1987) 13
Henderson v. *Morgan*, 426 U.S. 637 (1976) 8
Henry v. *Mississippi*, 379 U.S. 443 (1965) 8
Powell v. *Alabama*, 287 U.S. 45 (1932) 11
Sanders v. *United States*, 373 U.S. 1 (1963) 7
Swain v. *Alabama*, 380 U.S. 202 (1965) 12
Taylor v. *Illinois*, No. 86-5963 (Jan. 25, 1988) 7
United States v. *Campisi*, 583 F.2d 692 (3d Cir. 1978) 12
United States v. *Fitapelli*, 786 F.2d 1461 (11th Cir. 1986) 10
United States v. *Houston*, 547 F.2d 104 (9th Cir. 1976) 9
United States v. *Lagrone*, 727 F.2d 1037 (11th Cir. 1984) 11-12
United States v. *Rubio*, 727 F.2d 786 (9th Cir. 1983) 9
United States v. *Sliker*, 751 F.2d 477 (2d Cir. 1984), cert denied, 470 U.S. 1058 (1985) 8
United States v. *Stephens*, 609 F.2d 230 (5th Cir. 1980) 8
United States v. *Stewart*, 700 F.2d 702 (11th Cir. 1983) 7
Wiley v. *Sowders*, 647 F.2d 642 (6th Cir.), cert. denied, 454 U.S. 1091 (1981) 8

Cases – Continued: Page

Winters v. *Cook*, 489 F.2d 174 (5th Cir. 1973) 8
Young v. *Duckworth*, 733 F.2d 482 (7th Cir. 1984) 10

Statutes:

18 U.S.C. 2113(a) 1-2
18 U.S.C. 2113(d) 1-2
18 U.S.C. 3579(e)(1) 13
28 U.S.C. 2255 ..... 2, 5, 7, 11

Miscellaneous:

1 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* (1977) 9

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 832 F.2d 561.

JURISDICTION

The judgment of the court of appeals (Pet. App. B1-B2) was entered on November 19, 1987. A petition for rehearing was denied on January 13, 1988 (Pet. App. C1-C2). The petition for a writ of certiorari was filed on April 4, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted on four counts of bank robbery and assault during the commission of a bank robbery, in violation of 18

U.S.C. 2113(a) and (d). He was sentenced to concurrent 20-year terms of imprisonment on the first three counts and to a consecutive five-year term of probation on the remaining count. He was also ordered to make restitution to the victim banks (Pet. App. A3). After his convictions were affirmed on direct appeal, petitioner made a motion to vacate his sentence pursuant to 28 U.S.C. 2255. The district court denied the motion (Pet. App. D1-D2) and the court of appeals affirmed (Pet. App. A1-A17).

1. The evidence at trial is summarized in the government's brief in the court of appeals (Gov't C.A. Br. 3-7). Between April 10 and July 6, 1984, four banks in the Atlanta, Georgia, area were robbed at gunpoint by a lone male. A flyer containing copies of bank surveillance photographs of the robber and a description of his modus operandi were circulated to FBI field offices throughout the country. An FBI agent in Chicago, Illinois, noticed that the photograph resembled petitioner, who was suspected of committing bank robberies in Chicago. A comparison of bank surveillance photographs of the Chicago robberies with those of the Atlanta robberies and with mug shots of petitioner confirmed that the photographs were all of the same person.

The agents determined that petitioner resided in Chamblee, Georgia. Several FBI agents visited his home, and when petitioner answered the door the agents took him into custody. Petitioner was carrying $1,050 in his wallet and a phony birth certificate at the time. During a subsequent search of petitioner's house, the agents discovered another $1,200 stuffed in a boot as well as a loaded revolver. The serial numbers of the bills matched those of bills that had been delivered to one of the banks shortly before the robbery. While the FBI agents were searching the premises, petitioner's girlfriend arrived. She

informed the FBI that she had observed petitioner on two separate occasions with more than $1,000 in cash. She said that when she had inquired how he had gotten the money, petitioner had said that he had robbed banks and had committed the crimes alone and with a pistol.

In addition, tellers at each of the banks that had been robbed selected petitioner's photograph from a photographic array as that of the robber. Employees from three of the four victim banks were also able to make in-court identifications of petitioner.

2. Petitioner was represented at trial by a federal public defender. During the trial, the prosecutor announced that the government and the defense had agreed to a number of stipulations. Without objection from petitioner or his attorney, the prosecutor then read a stipulation concerning the dates of the robberies, the amounts taken, and the federally insured status of each of the victim banks. After the stipulation was read, the trial judge instructed the jury that "where counsel for the parties enter into a stipulation, as has been done here, you are to take the facts so stipulated and as read by counsel as being proved without the necessity for further proof" (3 Tr. 33). As a result of the stipulation, the only controverted issue at trial was the identity of the bank robber, and on that issue the defense presented the testimony of four alibi witnesses.

At the close of the evidence, the court explained to the jury that (Pet. App. E):

> many of [the elements of the bank robbery offenses] are not [at] issue in this trial. First, the locations of the banks involved are within the Northern District of Georgia as alleged, and the Court will take judicial notice of that fact and no evidence is required. Secondly, it is stipulated that the banks were banks operating under the laws of the United States, and

> member banks of the FDIC and SLIC; and, third, that on the dates, approximately [at the] times named, money belonging to or in the care, custody, control, and management or possession of the banks was actually taken by someone by force or violence or by intimidation, which leaves for your consideration two contested issues.

The jury returned a verdict of guilty as to each count on November 28, 1984. On December 3, 1984, petitioner filed a motion for substitution of counsel. The stated reason for the motion was that he wished to seek a new trial on the ground that he had been inadequately represented. Although the trial judge issued an order relieving petitioner's attorney of her duties on December 27, 1984, he neglected either to notify her that the order had been issued or to appoint a substitute. Sentencing took place on January 15, 1985. Believing that she was still petitioner's attorney, the public defender appeared on his behalf and the trial judge, who had apparently forgotten that he had signed the substitution order, treated her as petitioner's counsel. At the conclusion of the sentencing proceeding, when the trial judge informed petitioner that his attorney could assist him in filing an appeal, the public defender reminded the court that the motion to withdraw was pending. The following day, the court appointed substitute counsel (Pet. App. A2-A6).

On appeal, petitioner argued that the stipulation concerning the federally insured status of the banks was inadequate because neither petitioner nor counsel acknowledged it in open court; that the court erred in failing to instruct the jury concerning the elements of the bank robbery offenses to which stipulations had been entered; and that petitioner was entitled to a new trial due to ineffective

assistance of counsel.[1] The court of appeals affirmed by judgment order (773 F.2d 1237 (Table)), and this Court denied review (474 U.S. 1067).

3. Petitioner subsequently filed a motion for collateral relief pursuant to 28 U.S.C. 2255. He alleged, inter alia, that his trial counsel had improperly stipulated to an element of the bank robbery offenses without first obtaining his approval; that he was not represented by counsel during his sentencing; and that he received ineffective assistance of counsel as the result of his attorney's failure to object both to the government's use of peremptory challenges to strike blacks from the petit jury and to the restitution order entered by the court, which petitioner claimed required excessive restitution. To support his allegations, petitioner filed an affidavit stating that his trial attorney had not obtained his approval prior to agreeing to the stipulation and had disregarded his request to object to the elimination of blacks from the jury. The district court denied the motion without an evidentiary hearing (Pet. App. D1-D2).

The court of appeals affirmed. The court first noted (Pet. App. A3-A7) that, "[w]hile the unusual sequence of the proceedings below makes it appear as though [petitioner] was unrepresented at sentencing," the public defender was present and actively representing him during the proceeding. Indeed, no one—not petitioner nor the trial court nor the public defender—was aware that the public defender had been officially relieved. Under these circumstances, the court concluded (*id.* at A7), "[petitioner] was represented by counsel at sentencing."

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[1] Petitioner also alleged that the evidence was insufficient as a matter of law; that the prosecutor had made certain improper arguments; and that the trial judge's instructions concerning the offense of assault were inadequate.

Next, the court noted (Pet. App. A9-A13) that, although "there are certain rights that cannot be waived absent a constitutionally voluntary waiver," a defense attorney may make a number of "tactical decision[s]" without the defendant's consent. "[T]he decision to stipulate to the insured status of the banks," the court stated (*id.* at A13 (citation and quotation marks omitted)), "is more a tactical decision than an infringement on an inherently personal right of fundamental importance." The court accordingly concluded (*id.* at A14) that it was proper for petitioner's counsel to stipulate to the insured status of the banks without a formal waiver by petitioner.

Finally, the court rejected (Pet. App. A16-A17) petitioner's claims of ineffective assistance of counsel at trial. Addressing petitioner's contention that counsel should have objected to the use of peremptory challenges to eliminate blacks from the jury as a violation of *Batson* v. *Kentucky*, 476 U.S. 79 (1986), the court observed (Pet. App. A16) that, at the time of trial, *Batson* had not been decided yet. Furthermore, this Court has concluded that "*Batson* v. *Kentucky* is an explicit and substantial break with prior precedent" and accordingly held that "the rule in *Batson* should not be available to [a defendant] on federal habeas corpus review of his convictions." *Allen* v. *Hardy*, 478 U.S. 255, 258, 261 (1986). Under these circumstances, the court of appeals held (Pet. App. A17), petitioner "cannot raise this claim in his collateral attack, and, in any event, the public defender's performance was in no way ineffective by failing to raise a *Batson* objection." The court rejected (*ibid.*) petitioner's other claims of ineffective assistance as "groundless" and "not merit[ing] discussion."

ARGUMENT

1. a. Petitioner contends (Pet. 16-21) that, because he did not personally agree to stipulate that the victim banks were federally insured, the stipulation was without effect. That issue, however, was raised and rejected on petitioner's direct appeal (see Appellant's C.A. Br. 13-17). Absent an intervening change in the law, Section 2255 cannot be employed to relitigate a question raised and decided on direct review. *Sanders* v. *United States*, 373 U.S. 1, 15 (1963); *Barton* v. *United States*, 791 F.2d 265, 267 (2d Cir. 1986) (collecting cases). For that reason, the district court properly denied collateral relief. Even apart from that procedural bar, however, petitioner's claim is without merit.

As the Court recently observed in *Taylor* v. *Illinois*, No. 86-5963 (Jan. 25, 1988), slip op. 17 (footnote omitted), "[a]lthough there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client, the lawyer has—and must have—full authority to manage the conduct of the trial. The adversary process could not function effectively if every tactical decision required client approval." Although the Court's decision in *Taylor* did not contain a definitive catalogue of basic rights that the attorney cannot waive without the client's consent, it provided examples of those rights (slip op. 17 n.24), such as the right to plead not guilty, the right to a jury trial, and the right to be present during trial.

By contrast, the courts have held that it is perfectly permissible for an attorney, without the express consent of his client, to make tactical decisions during the course of the trial, even where those decisions have "constitutional implications." *United States* v. *Stewart*, 700 F.2d 702, 704 (11th Cir. 1983). Such decisions include: waiver of the right to trial by a 12-person jury (*ibid.*); waiver of the right

not to be tried while wearing prison garb (*Estelle* v. *Williams*, 425 U.S. 501 (1976)); waiver of the right to object to tainted evidence (*Henry* v. *Mississippi*, 379 U.S. 443 (1965)); and waiver of the right to object to the racial composition of the jury (*Winters* v. *Cook*, 489 F.2d 174 (5th Cir. 1973)).

The court of appeals was plainly correct in concluding that a stipulation to the fact that the victim banks were federally insured—a formal element of the offense of bank robbery that is seldom contested—was merely a "tactical decision" that was in no way comparable to a stipulation of guilt.[2] See *United States* v. *Stephens*, 609 F.2d 230, 232-233 (5th Cir. 1980) (footnote omitted) ("counsel in a criminal case may waive his client's Sixth Amendment right of confrontation by stipulating to the admission of evidence, so long as the defendant does not dissent from his attorney's decision, and so long as it can be said that the attorney's decision was a legitimate trial tactic or part of a prudent trial strategy"); *Wiley* v. *Sowders*, 647 F.2d 642, 649 (6th Cir.) (distinguishing between "tactically wise" stipulations "to a particular element of a charge" and a stipulation to facts that amount to the "functional equivalent" of a guilty plea), cert. denied, 454 U.S. 1091 (1981).[3]

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[2] As the Second Circuit observed in *United States* v. *Sliker*, 751 F.2d 477, 484 n.3 (1984), cert. denied, 470 U.S. 1058 (1985), in bank robbery prosecutions the parties routinely stipulate that the bank was insured by the FDIC.

[3] Petitioner mistakenly relies (Pet. 19-20) on Justice White's statement in *Henderson* v. *Morgan*, 426 U.S. 637, 650 (1976) (White, J. concurring), that "[i]t cannot be 'harmless error' wholly to deny a defendant a jury trial on one or all elements of the offense with which he is charged * * * [or to] permit a guilty plea to be entered * * * solely on the consent of the defendant's agent—his lawyer." As the court of appeals correctly noted (Pet. App. A8 n.6), *Henderson* v. *Morgan* involved the voluntariness of a plea of guilty when the defendant was

b. Petitioner also argues (Pet. 21-26) that the trial judge erred in instructing the jury that, because of the stipulation, the jury need not consider whether the banks were federally insured and whether, on the dates in question, money in the care, custody, control and management of the banks was taken by someone through force and violence. Again, however, since this issue was raised and rejected on direct appeal (Appellant's C.A. Br. 26), petitioner cannot raise it now. In any event, apart from that procedural defect, the claim is meritless.

It is axiomatic that when the government and the defense enter a stipulation of fact, the stipulated facts "will be deemed to have been conclusively established." *United States* v. *Houston,* 547 F.2d 104, 107 (9th Cir. 1976). See also *United States* v. *Rubio,* 727 F.2d 786, 797 (9th Cir. 1983). The stipulation is to be regarded by the jury as a matter conclusively proved, and the jury may be so instructed. *Houston,* 547 F.2d at 107. See 1 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 11.11, at 304 (1977) (approving instruction that "[w]hen

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not informed that intent to cause death was an element of the offense charged. This case does not involve a plea of guilty, and petitioner does not claim that he was unaware that the bank's federally insured status was an element of the offense.

Brookhart v. *Janis,* 384 U.S. 1 (1966), upon which petitioner also relies (Pet. 24), is equally inapposite. In *Brookhart,* trial counsel agreed, without the defendant's consent, that the defendant would be tried "in a proceeding which was the equivalent of a guilty plea and in which he would not have the right to be confronted with and cross-examine the witnesses against him" (384 U.S. at 7). In this case, by contrast, petitioner's counsel vigorously contested the bank robbery charges by challenging identification testimony and presenting alibi witnesses. She merely stipulated to facts that were beyond dispute: that the victim banks were robbed and that they were federally insured.

the attorneys on both sides stipulate or agree to the existence of a fact" "you must, unless otherwise instructed, accept the stipulation as evidence, and regard that fact as proved").[4]

2. Petitioner also claims (Pet. 26-31) that, because of the district court's December 27, 1984, order releasing his defense counsel from further responsibility in his case, he was denied the assistance of counsel during his January 16, 1985, sentencing proceeding. This issue too was raised and rejected on direct appeal (see Appellant's C.A. Br. 30-31). And, again, the claim is without merit.

Although a trial judge should not release one defense counsel until a new one is appointed, "it does not follow that every lapse in representation, however brief and inconsequential, deprives a criminal defendant of his rights under the Sixth Amendment." *Young* v. *Duckworth,* 733 F.2d 482, 483 (7th Cir. 1984). The court below was plainly correct in concluding that there was no such deprivation in this case. Although the trial judge signed an order relieving petitioner's appointed counsel on December 27, 1984, the court did not advise petitioner or counsel of the termination order and did not even recall issuing it. Thus, all participants in the sentencing proceedings believed that the public defender was still petitioner's attorney. As a result,

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[4] Petitioner's reliance (Pet. 22-25) upon cases that address the impropriety of changing or deleting elements of the offense in a jury instruction (*e.g., United States* v. *Fitapelli,* 786 F.2d 1461, 1463-1464 (11th Cir. 1986)) is misplaced. In this case, the trial judge expressly instructed the jury that the elements to which stipulations were entered were "essential elements" of the offense of bank robbery. He merely informed the jury, consistently with governing legal principles, that the stipulation of fact concerning those elements obviated the necessity of considering those issues and that the jury need only consider the contested issues during its deliberations (Pet. App. E).

she continued her attorney-client relationship with petitioner throughout the sentencing proceeding,[5] acted as his counsel during the proceeding, and was treated as such by the trial court. The district court's act of signing the termination order had absolutely no effect on petitioner's right to the effective representation of counsel during that proceeding.[6]

3. Finally, petitioner maintains (Pet. 31-38) that the district court improperly failed to conduct evidentiary hearings as to the competence of his counsel and as to whether defense counsel actually agreed to the stipulation of fact. A motion to vacate a sentence, however, does not automatically require an evidentiary hearing. Section 2255 expressly provides that a hearing is not necessary if "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." Thus, a legal issue may be decided without an evidentiary hearing when the record of the case provides a sufficient factual basis to resolve the issue. See, *e.g.*, *United States* v.

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[5] Petitioner speculates (Pet. 34) that defense counsel may not have prepared for the sentencing hearing because she knew that she no longer represented him. That supposition, however, is contrary to counsel's statements during the sentencing proceeding (see Pet. App. A6), which clearly reflected her belief that she was still his attorney.

[6] This case is readily distinguishable from *Powell* v. *Alabama*, 287 U.S. 45 (1932), upon which petitioner relies (Pet. 27-28). In *Powell*, the trial judge designated "all the members of the bar" to represent the defendants during pretrial proceedings and neglected to appoint any particular attorney to represent them until the morning of the trial. The Court found that the trial judge's action with respect to the appointment of counsel "was little more than an expansive gesture, imposing no substantial or definite obligation upon any one" and that, therefore, during the most critical period of the proceedings, "the defendants did not have the aid of counsel in any real sense." *Id.* at 56-57. In this case, by contrast, petitioner's appointed counsel actively represented him from the inception of the proceedings through sentencing.

Lagrone, 727 F.2d 1037, 1038 (11th Cir. 1984); *United States* v. *Campisi,* 583 F.2d 692, 695 (3d Cir. 1978); *Forrester* v. *United States,* 456 F.2d 905, 907 (5th Cir.), cert. denied, 409 U.S. 856 (1972).

On the basis of the trial record, the courts below could properly conclude that petitioner's claims of ineffective assistance of counsel did not warrant a hearing. Although petitioner complains (Pet. 34-35) that his trial counsel failed to object to the use of peremptory challenges to eliminate blacks from the jury venire, at the time of his trial a defendant could not prevail on such a claim absent evidence of "purposeful discrimination" through the systematic exclusion of blacks " 'in case after case.' " See *Batson* v. *Kentucky,* 476 U.S. 79, 91-92 (1986) (quoting *Swain* v. *Alabama,* 380 U.S. 202, 223 (1965)). Although this Court's decision in *Batson* repudiated the stringent evidentiary standard articulated in *Swain* (see *Batson,* 476 U.S. at 95), *Batson* was decided, as the court below observed (Pet. App. A16-A17), more than a year and a half after the trial in this case. Moreover, in *Allen* v. *Hardy,* 478 U.S. 255, 258 (1986), this Court observed that *Batson* significantly changed the evidentiary standard of *Swain.* The *Allen* Court explained (478 U.S. at 260 (footnote omitted)) that "[t]here [was] no question that prosecutors, trial judges, and appellate courts throughout our state and federal systems justifiably have relied on the standard of *Swain.*" Consequently, it cannot be said that petitioner's trial attorney was derelict in refusing, without a further evidentiary basis, to object to the prosecutor's use of his peremptory challenges.[7]

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[7] In *Allen* v. *Hardy, supra,* the Court concluded that its holding in *Batson* was not retroactively applicable to cases that had become final at the time of that decision. Since petitioner's conviction became final more that three months prior to the Court's decision in *Batson,* the decision in *Batson* would not have provided him with a basis for ap-

As the court of appeals observed (Pet. App. A5-A6 n.3), the prosecutor's decision not to challenge the restitution order was also a "reasonable tactical decision[ ], and fell far short of the *Strickland* standard for ineffective assistance of counsel." Although petitioner claims that the order was unlawfully excessive because the victim banks "presumably have been repaid" (Pet. 9), a restitution order is proper even where the victim has been indemnified by a third party; in that case the court may order that the defendant compensate the indemnifier. See 18 U.S.C. 3579(e)(1). It is therefore unlikely that an objection to the restitution order on this ground would have reduced the amount of restitution ordered.

Nor was a factual hearing warranted to determine whether petitioner's attorney had actually assented to the stipulation of fact. The trial transcript reflects that the prosecutor expressly represented that the stipulation was entered by the government and the defendant, and immediately thereafter the trial judge announced that "where *counsel for the parties* enter into a stipulation, * * * you are to take the facts so stipulated * * * as being proved without the necessity for further proof" (3 Tr. 32-33 (emphasis added)). Since neither petitioner nor his trial counsel objected to those representations, it was reasonable for the court to conclude that petitioner's attorney had agreed to stipulate to the uncontested matters.[8]

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pellate relief even if his attorney had objected to the striking of blacks from the jury venire. Petitioner's reliance (Pet. 35) upon *Griffith* v. *Kentucky*, No. 85-5221 (Jan. 13, 1987), is misplaced. *Griffith* merely held that, although not available on collateral attack, the *Batson* rule applies to cases that were pending on direct review when *Batson* was decided. *Griffith*, slip op. 11-13. Petitioner's case does not fall within that category.

[8] Petitioner's reliance (Pet. 37) on *Anderegg* v. *High Standard, Inc.*, 825 F.2d 77 (5th Cir. 1987), to support his argument that a stipulation

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1988

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is of no effect unless reduced to writing is plainly misplaced. That case involved a Texas procedural rule requiring stipulations to be in writing, signed, and filed by the parties as part of the record. The court held that the rule was applicable to Texas cases tried in federal courts on the basis of diversity jurisdiction.

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